IN THE

Supreme Court of the United States

October Term, 1946.

No. 69.

AMERICAN STEVEDORES, INC.,
Petitioner,

v.

ROSARIO PORELLO,

AND

UNITED STATES OF AMERICA,
Respondents.

Brief on Behalf of Respondent, Rosario Porello, on Writ of Certiorari to the United State Circuit Court of Appeals for the Second Circuit.

JACOB RASSNER,
Proctor for Respondent,
Rosario Porello.

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INDEX.

	PAGE
Statement of the Case	2
POINT I.—This Court has decided in the case of Canadian Aviator, Ltd. v. United States, 324 U. S. 215, decided February 26, 1945, that under the Public Vessels Act of 1925, the United States has consented to be sued for damages for personal injuries or wrongful death	3
POINT II.—Congress has stated that only by accepting compensation under an award by a Deputy Commissioner, may a longshoreman be barred from a third party action, and is not barred when he accepts benefits without an award. Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b). This Court held that acceptance of voluntary payments did not constitute a bar to a third party action in the case of Brady v. Roosevelt S. S. Co., 317 U. S. 575	10

CASES CITED.

Agwilines Inc. v. U. S. A., 1943 A. M. C. 715	8
Barry v. Barber S. S. Lines, Jan. 27, 1944, Civil 22-553	11
Bellanfuono v. American Export Lines, Inc., 1944 A. M. C. 437	15
Brady v. Roosevelt S. S. Co., 317 U. S. 575	10-11, 23
Brusich v. Grace Line Inc., 56 F. Supp. 48	11, 14, 15

PAGE

Cupo v. Isthmian S. S. Co., 56 F. Supp. 45 10
Canadian Aviator, Ltd. v. United States, 324 U. S. 215 ..... 3, 8, 22
Dobson v. United States, 1928 A. M. C. 1583, 27 F. (2d) 807 8
Grasso v. Lorentzen, 149 Fed. (2d) 127 (C. C. A. Md. C.) c. d. Dec. 8, 1945 10
Iaria v. Silver Line, 56 F. Supp. 42 10
Jakuboski v. Matson Navigation Co., 264 App. Div. 735 and 205 App. Div. 859 20
O'Neal v. United States, 1925 A. M. C. 1325, 11 F. (2d) 869 8
Pugliese v. Panama Transport Co., 1944 A. M. C. 1101 11
Riccardi v. American Export Lines, 294 N. Y. 812.. 10, 20
Ross v. C. D. Mallory, 1943 A. M. C. 729 20
Sessa v. Weeks Stevedoring Co., 56 F. Supp. 50 .. 11, 14
State of Maine v. U. S. D. C., Me. 1942, 45 F. Supp. 35 8
Tartaglio v. Cunard White Star, 56 F. Supp. 55 .. 10
Toomey v. Waterman S. S. Corporation, 123 F. (2d) 718 13
The Etna, 138 Fed. (2d) 37 (C. C. A. 3rd C.) .. 10, 12, 13, 21
U. S. v. Caffey, Judge, et al., 141 Fed. (2d) 69 8
Wright case, C. C. A. N. Y. 1940, 109 F. (2d) 699 .. 9

STATUTES AND AUTHORITIES CITED.

	PAGE
Public Vessels Act, 46 U. S. C. A., Sec. 781	3, 7
Report #33, 75th Congress, 1st Session of House of Representatives	5
Report of the Hearing of the 66th Congress, 3rd Session, Feb. 7, 1921, Report No. 1301 of the House of Representatives	6
66 Cong. Rec. 2087	6
Suits in Admiralty Act,	7, 22
Robinson on Admiralty, 1939 Edition, page 267	8
Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b)	10
Code of Federal Regulations, 1941 Supp. Title 20, page 1873, subdiv. (b) (d)	11
U. S. C. A. Title 33, Section 919, subdiv. (g)	12
U. S. C. A. Title 33, Section 921, subdiv. (a)	12
U. S. C. A. Title 33, Section 919, subdiv. (c)	12
Longshoremen's and Harbor Workers Compensation Act of 1927, 33 U. S. C. 9., Secs. 901	21, 23

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AMERICAN STEVEDORES, INC., *Petitioner,* v. ROSARIO PORELLO, AND UNITED STATES OF AMERICA, *Respondents.*	No. 69.

Brief on Behalf of Respondent, Rosario Porello, on Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The respondent, Rosario Porello, is concerned solely with the question as to his right to maintain an action for damages as a result of personal injuries caused by the Government's vessel, and accordingly is confining his brief to the Assignments of Errors designated 1 and 2.

The Assignments of Errors designated 3, 4 and 5 raise questions as to the rights between the petitioner and the respondent, United States of America, in which the respondent, Rosario Porello, is not concerned.

The question of the right of the respondent, Rosario Porello to sue the respondent, United States of America, has not been raised before this Court by the United States of America, but has been raised by the petitioner, Ameri-

can Stevedores, Inc., who was interpleaded in the District Court action by the United States of America.

Statement of the Case.

Rosario Porello suffered a broken back on the 23rd day of September, 1942, while employed as a stevedore by the contracting stevedore, American Stevedores, Inc., aboard the Navy Transport, *Thomas Stone*, which was owned and operated by the United States (R. 21a).

While stowing general cargo in the #1 hold of the vessel, a strongback or thwart ship beam, together with several hatch covers fell striking Porello and causing him serious and permanent injuries (R. 120).

The plans of the vessel called for a locking device to hold the strongback in place, but the same being broken off or missing resulted in a beam falling and causing the accident (R. 121).

The Circuit Court of Appeals for the Second Circuit affirmed the Trial Court's finding that Rosario Porello was entitled to recover damages from the respondent, United States of America for injuries caused by the vessel.

The respondent, United States of America, has not asked this Court to review the holding by the Lower Court that Rosario Porello was entitled to maintain an action for damages for personal injuries against the United States of America.

The petitioner, which was interpleaded by the respondent, United States of America in the District Court below, is the one, which raises the question, as to whether Rosario Porello might maintain an action, against the owner and operator of the vessel. The question is not raised in this Court by the ship's owner and operator, the United States of America.

POINT I.

This Court has decided in the case of Canadian Aviator, Ltd. v. United States, 324 U. S. 215, decided February 26, 1945, that under the Public Vessels Act of 1925, the United States has consented to be sued for damages for personal injuries or wrongful death.

The construction of the Public Vessels Act, 46 U. S. C. A., Sec. 781, is no longer the subject of review, as every feature thereof has been fully determined by this Court in the case of *Canadian Aviator, Ltd.* v. *United States, supra.*

After the exhaustive examination by this Court of the legislative history of the Public Vessels Act and the Congressional intent therefore and after rendering the enlightening, informative and instructive opinion which was a full and complete dissertation on the construction of every feature of said Act, so lucculently expressed in the opinion in the recent case of *Canadian Aviator, Ltd.* v. *United States, supra*, it seems somewhat presumptuous to ask this Court to redeliberate this question.

This Court stated in the *Canadian Aviator, Ltd.* v. *United States* case, *supra*, that Congress intended to adopt the customary legal terminology of the Admiralty Law and consequently there seems no need for the United States Supreme Court to be called upon to tell the lower Admiralty Courts of this country what is meant by the word "damages" when applied to an admiralty tort.

The norm laid down by this Court seems reasonable enough, that a word should be given its customary legal terminology and it does not seem necessary to ask this Court to give the meaning of each and every word of an Act by a separate decision or opinion, in each and every action against the Government.

The petitioner urges that this Court in construing the word "damages" as used by Congress, should limit the meaning thereof to "property damage claims" instead of "all claims", as specifically expressed by Congress.

The error of such contention becomes obvious when reference is made to Senator Bayard's explanation to the Senate on February 12, 1925, of the purpose of House Bill 9535 which became the Public Vessels Act, when he stated that the Act was for the purpose of giving

> *"a person aggrieved because of an accident by reason of the shortcoming of a United States ship the right to go into the district court and prosecute his action * * *."*

He stated this referred to

> *"* * * all maritime accidents of any kind * * *."*

Petitioner's reference to legislative history of the Act controverts its conclusion. Such reference establishes the fact that not until after the restrictions to:

1. "Property damage" and
2. "Damage by collision",

were removed did Congress give favorable consideration to the bill, which subsequently became the Public Vessels Act.

The fact that Congress saw fit to pass Acts for the relief of Edna M. Callahan and others referred to on pages 22 and 23 of petitioner's brief, for injuries suffered aboard a Navy motor launch on October 10, 1932, without putting the claimants to the expense and trouble of litigation or filing claims with the Court of Claims, does not indicate that these people could not have maintained actions against the Government. See letter of Claude A.

Swanson, Secretary of Navy, dated September 1, 1933, submitted with Report #33, 75th Congress, 1st Session of House of Representatives, which accompanied H. R. 601.

Such appropriations were then necessary regardless of whether the claims were for personal injuries or property damage against the United States, and irrespective of whether the money was required to pay a judgment entered on a decree or a settlement agreed upon without litigation.

The fact that the Secretary of Navy was authorized to settle property damage claims for limited amounts as stated by petitioner on page 10 of its brief, or the Secretary of War to settle claims for limited amounts for damages caused by non-combat activities of the army, as stated on page 24 of petitioner's brief, does not mean that the provisions of the Public Vessels Act were eliminated, but merely means that Congress was endeavoring to avoid as much litigation and claims, with the Court of Claims, as possible, particularly for small amounts.

It would be unconscionable to think that Congress intended to deprive a class of persons suffering major damage, from any relief, when it was granting relief to persons, suffering minor damages.

The fact that Congress was endeavoring to enact further legislation for protection of persons injured ashore, of persons in the Government employ, for *both* property damage and personal injury damage claims and the fact that claims were settled by the Government without litigation does not alter the intent of Congress in passing the Public Vessels Act, to afford redress for all maritime accidents, as heretofore pointed out in the explanation by Senator Bayard to the Senate on February 12, 1925, of the purposes of House Bill 9535, which became the Public Vessels Act.

Congress never was satisfied to enact special legislation for the protection of shipowners to the exclusion of persons suffering personal injury.

Many of our Congressmen objected to special privileges being extended to shipowners and operators to the exclusion of personal injury claimants and others, as shown by the following (p. 43 of the Report of the Hearings of the 66th Congress, 3rd Session, Feb. 7, 1921, Report No. 1301 of the House of Representatives):

> "Colonel Lee: But why the door should be opened to these shipowners, with all due respect to them, as they are an extremely worthy set, to press their claims in tort against the Government, and not to every other tort sufferer, so to speak, is not clear. If the shipowners are allowed to sue, then everybody else having a tort claim against the government it seems to me, in justice should be allowed the same relief."

(p. 44 of the same Report):

> "Mr. Igoe: For instance, we have before the Committee, speaking of torts, the proposition of allowing persons who sustain personal injuries by reason, for instance, of the negligent operation of Government automobiles of the Post Office Department, to bring suit against the Government. Some of us feel that while we are passing laws for the rehabilitation of cripples in industry, we might take care of a few cripples that the Government is responsible for, and I just wondered if there is not a difference between subjecting the Government to tort actions ordinarily and this particular case."

Mr. Upshaw said, at 66 Cong. Rec. 2087:

> "Quite a number of us are interested in cases of this kind, where lives of people are lost by reason

of their being run over by Government trucks, and things of that kind. Is it possible to bring in an omnibus bill before this Congress ends that will give to those interested an opportunity to proceed for the settlement of those claims?"

Mr. Underhill replied:

"* * * I shall devote some of my time in the summer vacation to the formulation of a bill which I shall present to Congress at the next session; so that the old idea, abandoned on the continent, that 'the king can do no wrong,' will be abandoned here in the United States, and the people of the United States will be able to secure justice from their Government."

Such bills were *not acceptable* to Congress.

Finally, the restriction limiting suits in admiralty by owners of vessels was stricken out.

The restriction *limiting the causes of action to property damage* resulting from collision *was stricken out.*

In place thereof, House Bill 9535 was submitted which provided:

*"That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, * * *"*

This bill was passed by Congress and became law, Mar. 3, 1925, c. 428, Sec. 1, 43 Stat. 112, 46 U. S. C. A., Secs. 781 to 790, commonly known as *Public Vessels Act.*

The effect of this Act was to eliminate the defense of sovereign immunity and to extend the rights provided by the Act of Mar. 9, 1920, c. 95, Sec. 1, 41 Stat. 525, 46 U. S. C. A., Secs. 741 to 752, commonly known as *Suits in Admiralty Act.*

The effect of the Public Vessels Act was to remove the defense of sovereign immunity, where a public vessel was involved, so that the rights provided by the Suits in Admiralty Act, to a personal injury claimant, would not be limited only to merchant vessels of the United States, but would be extended to public vessels as well. See:

State of Maine v. *U. S. D. C.*, Me. 1942, 45 F. Supp. 35.

Both Acts are to be considered in *pari materia*.

The Second Circuit Court of Appeals in the case of *U. S.* v. *Caffey, Judge, et al.*, 141 Fed. (2d) 69, on page 70, stated in no uncertain terms that the two statutes are to be construed together.

The aforesaid case was an appeal of Judge Caffey's decision in the case of *Agwilines Inc.* v. *U. S. A.*, 1943 A. M. C. 715, where on page 717, Judge Caffey stated as follows:

> "• • • The two statutes are in *pari materia* (*State of Maine* v. *U. S.*, 1942 A. M. C. 1075, 45 Fed. Supp. 35, 37)."

This Court in its opinion in the *Canadian Aviator Ltd.* case, *supra*, discusses the cases of *Dobson* v. *United States*, 1928 A. M. C. 1583, 27 F. (2d) 807, and *O'Neal* v. *United States*, 1925 A. M. C. 1325, 11 F. (2d) 869, points out that both Dobson and O'Neal were of the personnel of his respective vessel and *for that reason only*, the actions could not be maintained under the Public Vessels Act. The logical meaning therefore, is that if Dobson and O'Neal had not been members of the personnel of his respective vessel, he would have been entitled to maintain the action under the Public Vessels Act.

Robinson on Admiralty, 1939 Edition, states on page 267, speaking of the Public Vessels Act:

> "From this outline of the act it is to be seen that the United States has accepted liability for its public vessels and gives up, in its own courts, by a standing waiver, its exemption under the sovereign immunity."

Under this Act, libelant has the same rights as he would have had against the Government were the vessel involved a merchant vessel belonging to the United States.

In the *Wright* case, C. C. A. N. Y. 1940, 109 F. (2d) 699, on page 701, the court stated:

> "Whatever may have been the previous rule under *The Thekla* (266 U. S. 328), *supra*, we think with the court below that the Public Vessels Act applied to all claims against the United States for damages caused by public vessels * * *."

Incidentally, the vessel in question was not a war vessel, but one carrying general cargo and for all intents and purposes was engaged as any commercial mercantile vessel in the transportation of passengers and cargo.

It is interesting to note that the Government has not asked this Court to review the decision of the lower Court, which held that an action against it might be maintained by Rosario Porello.

POINT II.

Congress has stated that only by accepting compensation under an award by a Deputy Commissioner, may a longshoreman be barred from a third party action, and is not barred when he accepts benefits without an award. Navigation and Navigable Waters Act, Title 33, Sec. 933, U. S. C. A. Sub. (b).

This Court held that acceptance of voluntary payments did not constitute a bar to a third party action in the case of Brady v. Roosevelt S. S. Co., 317 U. S. 575.

Congress has clearly stated the essential prerequisite necessary to bar a third party action.

> *Navigation and Navigable Waters Act*, Title 33, Sec. 933, U. S. C. A. Sub. (b).

The Circuit Court of Appeals for the Second Circuit, the Circuit Court of Appeals for the Third Circuit, the Supreme Court of the State of New York, and all the District Courts which have passed on this question, have uniformly held, that a longshoreman is not barred from maintaining a third party action, so long as he has not accepted compensation, under an award by a deputy commissioner of the United States Compensation Commission. See:

> *Grasso* v. *Lorentzen*, 149 Fed. (2d) 127 (C. C. A. 2nd C.) cd. Dec. 8, 1945;
> *The Etna*, 138 Fed. (2d) 37 (C. C. A. 3rd C.);
> *Ricciardi* v. *American Export Lines*, 294 N. Y. 812;
> *Iaria* v. *Silver Line*, 56 F. Supp. 42, Judge Mandelbaum;
> *Cupo* v. *Isthmian S.S. Co.*, 56 F. Supp. 45, Judge Leibell;
> *Tartaglio* v. *Cunard White Star*, 56 F. Supp. 55, Judge Rifkind;

Pugliese v. *Panama Transport Co.*, Judge Coxe, 1944 A. M. C. 1101;

Barry v. *Barber S.S. Lines*, Jan. 27, 1944, civil 22-553, Judge Leibell (not reported);

Brusich v. *Grace Line Inc.*, 56 F. Supp. 48, Judge Caffey;

Sessa v. *Weeks Stevedoring Co.*, 56 F. Supp. 50, Judge Moscowitz.

The United States Supreme Court has held in the case of *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575 (N. Y. 1943), that a federal employee injured aboard a vessel, is not barred from maintaining a third party suit so long as he has not accepted compensation under a final award.

The report of an informal conference by a claims examiner does not have the legal effect of an award by a deputy commissioner.

A claims examiner's function is never to make any finding, but solely and exclusively to aid a claimant and the employer or carrier to amicably adjust their differences, to narrow the issues and to simplify the method of proof.

See:

Code of Federal Regulations, 1941 Supp. Title 20, page 1873, under sub-division (b).

After the informal conferences have been terminated, the parties may stipulate as to agreed facts, and subdivision (d), provides the method for so stipulating in order that the stipulation may become effective.

See: *Subdivision (d)*

"Such stipulations when signed by the parties in interest shall become part of the record of the case."

The claims examiner cannot substitute for the deputy commissioner, for even one deputy commissioner may not substitute for another without the consent of the commission.

See:

U. S. C. A., Title 33, Section 919, sub-division (g).

Under *Section 919, sub-division* (*c*), provision is made as to who should make the award, and it is specifically provided that the award must be made by the deputy commissioner.

Section 921 (*a*), provides as follows:

> "A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this chapter."

Section 919, sub-division (*c*), provides:

> "* * * the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

Insofar as the law provides who should make the award, what constitutes an award and when an award shall take effect, it remains no debatable question.

An award can be made only by a deputy commissioner, and can only become effective if made in accordance with Section 919 of the U. S. C. A. 33.

In the case of: *The Etna*, Circuit Court of Appeals, 3rd Circuit, decided September 9, 1943, 138 F. (2d) 37, on page 41, the court stated in speaking of U. S. C. A. 33, Section 933, sub-division (b):

> "This calls for the deputy commissioner's affirmative action which, together with its known legal

consequences, engages his supervision on the basis of the employer's liability for compensation under the Act."

It is obvious that there is quite a distinction between voluntary payments as made in the case at bar, and payments accepted under an award as contemplated by the amendment of 1938, *supra*.

In *The Etna* case, *supra*, the court further stated on page 41, in speaking of Section 914 (a):

> "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

It is obvious that the Circuit Court recognized the distinction between compensation paid, as in the case at bar, without an award, and compensation paid under an award by a deputy commissioner.

In the case of *Toomey* v. *Waterman S. S. Corporation*, 123 F. (2d) 718, it was found as a question of fact that a deputy commissioner had made an award.

The court said as follows:

> "* * * we think that the compensation was accepted 'under an award in a compensation order filed by the deputy commissioner'. The master reported that the deputy commissioner noted in his records the disposition he had made of the plaintiff's claim for compensation."

Proof was taken by the deputy commissioner.

A written finding was made by the deputy commissioner, and the deputy commissioner recorded the award in his notes.

The deputy commissioner notified all parties concerned as to his award.

The claimant accepted payments under such award.

All of the District Court Judges who have dealt with this question have held that the acceptance of compensation, not accepted under an award by a Deputy Commissioner, is no bar to a third party action.

In the case of *Sessa* v. *Weeks Stevedoring Co., supra,* the Court held that a filed written report of a claims examiner is not an award under the Act.

He stated in part as follows:

> "It will be noted that Sec. 933 (b) requires that the award in compensation order be made by the Deputy Commissioner.
>
> In the Circuit Court of Appeals for this Circuit in the case of *Toomey* v. *Waterman,* 1942, A. M. C. Page 90 (decision filed Nov. 24, 1941), it was held that the requirements of this section are met if the Deputy Commissioner makes a note in his records of the disposition that he has made of the plaintiff's claim for compensation, and that, under those circumstances, though the act was informal, it was equivalent to an order and satisfied the provisions of the amendment."

In the case of *Brusich* v. *Grace Line, supra,* the claimant went so far as to settle his claim for $1,000.00 at a hearing before a claims examiner, and Judge Caffey held that he was not barred from proceeding with his third party action, the Court holding in part as follows:

> "The way in which on its face such compensation shall be accepted, in order to transfer the cause of action to the employer, and thus deprive the employee of any right to maintain suit against the third person is definitely provided in subdivision

(b). In order to accomplish the transfer the acceptance (says the statute) shall be 'under an award in a compensation order filed by the deputy commissioner'. It is solely by this kind of procedure that title to the cause of action for the injury can pass, in literal conformity with the statute, to the employer."

In *Bellantuono* v. *American Export Lines, Inc.*, 1944 A. M. C. 437, where it is asserted that Judge Clancy held to the contrary, that is not so. Judge Clancy merely refused to strike out the answer as a matter of law and left the question for the Trial Court. The case being settled for approximately $12.000.00 during the trial, the question was never decided.

The Court's attention is respectfully called to two letters which are on file as Exhibits in the *Brusich* case, which show the view of the Deputy Commissioner as well as Chief Counsel for the United States Employees' Compensation Commission, which letters are submitted for such consideration as this Court may see fit to give to them.

The letters are as follows:

Official Correspondence Should Be Addressed to the Deputy Commissioner

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

DISTRICT No. 2

641 Washington Street, at Christopher

New York City 14

Commissioners

JEWELL W. SWOFFORD
Chairman

JOHN J. KEEGAN

ALBERT H. LADNER, JR.

SAMUEL S. LOWE
Deputy Commissioner

In reply refer to File No. .....

June 3rd, 1943

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Sir:

I have your letter of June 3, 1943 inquiring as to whether a claims examiner's memorandum of conference constitutes an award by the Deputy Commissioner in this Commission, and as to whether a finding by the claims examiner is binding on the Commissioner, the insurance carrier, or the claimant.

Conferences to consider claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act are in the first instance held by a claims examiner. This is an informal procedure, in the nature of a general discussion of the merits of the case, there is no testimony

taken under oath, and the general purpose of the procedure is to expedite payment and adjustment of the claim and where possible, disposition by agreement of the parties in interest. At its conclusion, the claims examiner files a "memorandum of conference" copies of which are supplied all interested parties. It is supposed to detail the essential facts in connection with the claim, and to conclude with his recommendation in regard to payment or further indicated course of action.

In reply to your question as to whether such a memorandum can be said to be the equivalent of a finding by the Deputy Commissioner, you are advised that the Commission believes that the compensation order contemplated by the Act requires the approval and signature of the Deputy Commissioner. When such an Order is filed, it becomes binding upon the parties in interest and subject to review on questions of law by the Federal Courts within the statutory period. Memoranda of conferences are not regarded as binding upon the parties in interest and the insurance carrier may decline to comply with the recommendation of the claims examiner, the claimant may decline to accept the recommendation, and both parties retain their rights under the law to a formal hearing before the Deputy Commissioner.

Very truly yours,

SAMUEL S. LOWE,
SAMUEL S. LOWE,
Deputy Commissioner.

SSL:MB

Official Correspondence Should Be Addressed to the Commission

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UNITED STATES EMPLOYEES' COMPENSATION COMMISSION
285 Madison Avenue
New York, 17, New York

Commissioners

JEWELL W. SWOFFORD
Chairman

WM. MCCAULEY
Secretary

JOHN M. MORIN

JOHN J. KEEGAN

In reply refer to File No. .....

December 18, 1943.

Jacob Rassner, Esq.,
220 Broadway,
New York, N. Y.

Dear Mr. Rassner:

In response to your inquiry by telephone as to the time when an election to take compensation under the Longshoremen's and Harbor Workers' Compensation Act becomes effective for the purpose of giving to an employer, by assignment under section 33 (b) of that Act, the employee's right of action against a third party, you are advised that section 33 (b) clearly states the time in the following language: "Acceptance of such compensation under an award i a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

The purpose of the 1938 amendment to section 33 (b) in this respect is too clear for argument, as may be observed by reading the comments of the Senate Judiciary Committee which reported the Bill, H. R. 5696 (see Sen-

ate Report No. 1988, Calendar No. 2100, 75th Congress, 3rd Session, page 9).

Section 33 (a) of the Longshoremen's Act provides for an election (1) to take compensation, or (2) to sue the third party. Notice of election *to sue* is provided for by form US-213. Notice of election to accept compensation is not required to be given in any special form, but the filing of a claim by an employee (Form US-203) indicates the employee's purpose and intention to claim compensation; and if pursuit of the claim to the point of a formal award in a compensation order, the *claim* plus the *formal award* completes the setting for assignment to operate under section 33 (b). In view of the language of section 33 (b) and the legislative history of the 1938 amendment to this section, it could hardly be validly asserted that assignment to the employer takes place any earlier than the date of acceptance of compensation under a compensation order. An employee who files a claim and before accepting compensation under an award, may desire to sue the third party. He would apparently have the right under the statute to exercise his third party remedy even though he had filed claim, provided he did not accept compensation under a formal award as the statute provides. The mere filing of the claim shows *prima facie* that the employee desires to pursue the compensation remedy, but according to the statute he does not lose his right to sue the third party *until* he accepts compensation in the matter indicated. Stated otherwise, while filing of claim indicates a desire to claim compensation, the election (for purposes of working the assignment) does not become effective until compensation is accepted under an award.

Very truly yours,

W. E. Boote,
W. E. Boote,
Chief Counsel.
HPM

All of the State Court cases which held to the contrary (including the case of *Ross* v. *C. D. Mallory*, 1943 A. M. C. 729, not officially reported, relied on by petitioner), were based on the decision in the case of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859), however, on January 2, 1945, the Appellate Division of the Second Department, which had decided the *Jakuboski* case, reversed itself in the case of *Ricciardi, appellant* v. *American Export Lines, Inc., respondent, supra*, as follows: 268 App. Div. 606.

> "We believe that subdivisions (a) and (b) should be read as one continuous, integrated enactment. Thus read, there is required the holding that the acceptance of compensation which was paid without an award did not constitute an election by the plaintiff to accept compensation rather than to sue a third party (*Tartaglio* v. *Cunard White Star, Lim.*, 56 Fed. Supp. 55; *Pugliese* v. *Panama Transport Co.*, opinion by Judge Coxe in the U. S. District Court for the Southern District of New York, October 5, 1943, not officially reported; *Brusch* v. *Grace Line, Inc.*, 56 Fed. Supp. 48; *Cupo* v. *Isthmian S.S. Co. Inc.*, 56 Fed. Supp. 45; Report No. 1945, House of Representatives, 75th Congress, Third Session, entitled 'Amending the Longshoremen's and Harbor Workers' Compensation Act', dated March 14, 1938).
>
> This decision is not in harmony with our holding in the two cases of *Jakuboski* v. *Matson Navigation Co.* (264 App. Div. 735, and 265 App. Div. 859). When those cases were decided the legislative purpose and intention in amending the act in 1938, as expressed in the report to the House of Representatives and the uniform holdings of the federal courts interpreting the act as amended were not

called to our attention. Such legislative expression and federal court interpretation of this federal act make imperative retraction of our holding in the *Jakuboski* cases."

In the *Etna* case, *supra*, the Court laid down the principle that an employer is entitled to reimbursement for compensation paid to a claimant and a claimant may not have a double recovery.

As to the equities in the case, the realistic fact is that usually, the same insurance company which insures the ship, insures the employer and consequently the provision, that an employer may sue a third party to the benefit of the claimant, has no practical application of value.

In addition to the foregoing, an employer receiving lucrative contracts from a ship does not bring actions against the ship for benefit of his employee.

The fact is that a longshoreman receives but $20.00 a week against a maximum recovery of $7,500.00, regardless of the fact that he may have lost his limbs or been crippled for life or otherwise seriously and permanently incapacitated, as was Porello.

It is for these reasons that Congress in 1938 saw fit to amend the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. A., Secs. 901, *et seq.* by adding subdivision (b) requiring the acceptance of compensation under an award in a compensation order filed by a deputy commissioner, in order to bar a longshoreman from his right to proceed with a third party action.

It is interesting to note that the United States Government has not asked this Court to review the decision of the Court below, which held that Porello was not barred from maintaining an action, against the United States of America by reason of having accepted voluntary payments without any award.

Conclusion.

The Supreme Court of the United States has already interpreted the intent of Congress with reference to the Public Vessels Act, *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, holding that the United States of America, under said Act, has consented to become suable for a personal injury claim and has waived sovereign immunity by said Act, placing public vessels in the same position of liability for torts, as did the Suits in Admiralty Act, 46 U. S. C. A., Sections 741-752, Act of March 9, 1920, C. 95, Sec. 1, 41 Stat. 525, with reference to government owned merchant vessels.

Substantial justice demands that in a situation as presented herein, particularly where general merchandise was being loaded aboard the vessel, that the Public Vessels Act should be read together with the Suits in Admiralty Act and considered as some of our lower Courts have stated in "*pari materia*".

Congress, having refused to pass any Act which limited suits to property damage and damage caused by collision, and only passed the Act after it was interpreted to include *all maritime accidents of any kind*, the ordinary construction of the English language should be given, and the words *all* and *any kind* should include personal injury claims.

All Acts of Congress, on this question, both prior and subsequent to the Public Vessels Act, clearly demonstrate that Congress was not in sympathy with the principle "that the King can do no wrong", and has consistently endeavored to enact legislation which would prevent technical defenses, to the intent of Congress, to afford redress for maritime torts, to persons injured and not only to entities suffering property damage.

As to the question of the libelant having received voluntary payments constituting a bar to his action, it must be borne in mind that prior to the amendment to the Long-

shoremen's and Harbor Workers' Compensation Act, by adding subdivision (b), such was the interpretation and Congress amended the Act by adding to the aforesaid Act 33 U. S. C. A. 933 subd. (b), so that this very evil might be eliminated and an injured person not be deprived of his day in Court by his employer giving him a few dollars, while the injured person was in complete ignorance of the effect of accepting same and perhaps confined to a hospital and in dire need. The purpose of requiring a formal award so that a responsible person, such as a deputy commissioner of a Government Bureau might inform the injured person of his rights, and thus prevent overreaching and undue advantage being practiced on an ignorant, uneducated or uninformed laborer.

Insofar as this Court has held that a federal employee injured aboard a vessel is not barred from maintaining a third party action by having accepted voluntary payments without a final award, *Brady* v. *Roosevelt S.S. Co., supra*, it is only fair and just that the same principle should apply to a longshoreman, who likewise accepted some voluntary payments without any award.

The Decree Appealed From Should Be Affirmed.

Respectfully submitted,

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Rosario Porello.